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CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 192.

CHESAPEAKE & DELAWARE CANAL COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The Chesapeake & Delaware Canal Company is here seeking to reverse a judgment of the Circuit Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the District of Delaware in favor of the United States for the amount of three dividends, with accrued interest, on 14,625 shares of stock of the canal company owned by the Government (R. 10, 28, 378–379).

The dividends were declared in the years 1873, 1875, and 1876, and amount in the aggregate, exclusive of interest, to $51,187.50.[1] Formal demand for

[1] With interest from November 17, 1911 (when the Secretary of the Treasury demanded payment), to the date of verdict, they amounted to $63,924.66, for which amount judgment was entered. (R. 28, 267, 272.)

their payment was made in November, 1911, and refused, and this action was commenced in March, 1912. There is no dispute either as to the Government's ownership of the stock or as to the dates and amounts of the dividends, or as to the fact that the dividends became due and payable to the United States at the times when they were respectively declared. The only questions presented relate to the presumption of payment arising from the lapse of time since the accrual of the Government's claim and before demand for its payment or institution of suit for its recovery, and to the evidence by which the presumption of payment was overcome.[1] (R. 1, 10–11, 266–267.)

The case has been twice tried before a jury and has been twice before the Circuit Court of Appeals (R. 366; 223 Fed. 926; 240 Fed. 903). At the first trial the Government merely proved its ownership of the stock in the canal company, the declaration by the canal company in 1873, 1875, and 1876 of the dividends sued for, and the fact that payment of the dividends was demanded and refused in 1911. The defendant offered no evidence, and the trial judge, on

[1] In the district court a plea of the statute of limitations (of Delaware) was rejected, on demurrer, and this action was sustained by the Circuit Court of Appeals on the ground that a State statute of limitations is inapplicable to a suit brought by the United States in its sovereign capacity. (R. 11, 12, 13, 15–22; 206 Fed. 964; 223 Fed. 926, 927–928.) Specifications designed to renew the question were included in the assignment of errors when the case was again before the Circuit Court of Appeals (Nos. 1, 15, 25, 26, 27; R. 345, 353, 357) but were not pressed; they are omitted from the assignment of errors in this court and the contention on the part of the canal company that the Delaware statute barred the present action is not made here.

the theory that the common law presumption of payment should not be applied against the United States, directed a verdict for the plaintiff and entered judgment in its favor. This judgment was reversed by the Circuit Court of Appeals (223 Fed. 926) on the ground that the presumption did apply even against the sovereign. But as the presumption was rebuttable a new trial was ordered.

At the second trial the Government, besides proving the facts formerly proved, introduced evidence to show nonpayment of the dividends as a matter of fact. The defendant, as before, offered no evidence. The case was submitted to the jury on the Government's proofs, the trial judge stating in his charge (R.266–272), among other things, that the case turned upon the single question of the payment or nonpayment of the dividends by the canal company to the United States (R. 267). A verdict and judgment in favor of the plaintiff again resulted. This judgment was affirmed by the Circuit Court of Appeals, and the present writ is prosecuted by the canal company to review the judgment of affirmance.[1] (R. 28, 366, 378.)

[1] The evidence adduced by the Government to show nonpayment of the dividends is discussed *infra*, pp. 19-36, 49-53. It consists, in the main, (*a*) of autoptic evidence, viz, forged vouchers, receipts, and correspondence purporting to emanate from the Government and to show payment of the dividends, which papers were produced under *subpœna duces tecum* from the files of the canal company, where they were found mixed with genuine vouchers and receipts for earlier dividends that actually were paid by the company to the Government (R. 38, 46, 53–54); (*b*) proof of the fact that the fabricated papers were exhibited as late as 1913 and 1914 by officers of the canal company to the agents of the Government as the company's evidences of payment (R. 46, 53, 57, 67–68); (*c*) the direct testimony of a former

THE ISSUES.

The assignment of errors (R. 379–399) contains forty-one items,[1] but yields, on analysis, only three basic questions which require consideration, namely:

First.—Was it incumbent upon the Government in order to rebut the presumption of payment not only to show nonpayment but "to explain the reason of the delay in making demand for payment"?

Second.—Was the evidence introduced by the Government to show nonpayment competent for the pupose?

Third.—Assuming its competency, was the evidence sufficient to justify the verdict of

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employee of the canal company to the effect that the dividends sued for had not been paid by the canal company prior to 1886 when he left the company's service, but that he and another employee of the company had embezzled the company's funds which should have been used to pay them, had withheld the sending to the Government of the customary notices of the declaration of the dividends, and had fabricated the vouchers, receipts, and correspondence, just referred to, purporting to evidence payment (even securing a small printing press and special type for the purpose of imitating the letterhead of the Treasury Department, R. 132) (R. 116 et seq.); and (*d*) proof of the absence from the appropriate files and records of the Treasury Department of any notice of the declaration of the three dividends sued for or any entries indicating that they were ever paid, whereas notices of all prior dividends were found in the department and produced and there was full record of their payment. (R. 159–164, 195–197, 200–261; Gov. Exs. No. 67, 77; R. 301, 317.)

A summary of this evidence appears in the opinion of the Circuit Court of Appeals (R. 366–373) and is reproduced *infra*, pp. 45, note.

[1] Nos. 1 to 12, inclusive, renew objections made by the defendant to the District Court's rulings on evidence offered by the palintiff. Nos. 13 to 19 renew objections to the trial judge's charge to the jury. Nos. 20 to 31 are objections to his refusal to instruct the jury as requested by the canal company. Nos. 32 to 41 challenge generally the correctness of the judgment of the Circuit Court of Appeals and raise objections to various holdings of that court as indicated in its opinion (R. 366–378).

Assignments No. 2, 5, 17, 29, 33, 37, 38, and 39 are not now relied on by the canal company. (See Brief for Chesapeake & Delaware Canal Company, pp. 5–21.)

the jury that the dividends had not in fact been paid?

In reference to those assignments which were before the Circuit Court of Appeals that court said (R. 378):

> We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.

ARGUMENT.

I.

THE DUTY WHICH CONFRONTED THE GOVERNMENT AT THE TRIAL WAS MERELY THAT OF PROVING NONPAYMENT OF ITS CLAIM. IT WAS UNDER NO REQUIREMENT "TO EXPLAIN THE REASON OF THE DELAY IN MAKING DEMAND FOR PAYMENT" SAVE IN SO FAR AS SUCH EXPLANATION MIGHT BE INCIDENTALLY INVOLVED IN OVERCOMING THE PRESUMPTION OF PAYMENT.

The single duty which confronted the Government at the trial (aside from the obvious one of proving the original indebtedness, as to which there is no dispute) was to overcome the presumption of payment, arising from the lapse of time, by affirmative proof that the claim had never been paid. There can be no real disagreement as to this fundamental proposition, although the canal company, as later shown, tries to avoid its consequences. It was solely in view of the presumption, and of the failure on the part of the Government to repel it by proof, that the case was remanded by the Circuit Court of Appeals to the District Court for a second trial (223 Fed. 926, 928–933). The appellate court on that occasion said (pp. 928–929):

> * * * If the plaintiff can not make out a prima facie case without showing also the fact of nonpayment for more than 20 years, the presumption of payment immediately arises, attaches at once to his evidence, and weakens it to such an extent that he can not recover unless he goes further and undertakes to prove facts tending to repel the presumption. The defendant is not required to repeat the proof that 20 years have elapsed without payment, for that has already appeared; he need only call the court's attention thereto, and may then

> rest upon the presumption or inference of fact arising therefrom until the plaintiff has strengthened the weak point in his own attack. If, however, the plaintiff makes no effort so to do, he fails altogether, but he fails solely for the reason that he has not made out his case—in other words, because his evidence lacks persuasive power. But the presumption is disputable, not conclusive. To a plea of the statute of limitations, the plaintiff can not successfully reply that the debt is still unpaid. The defendant may admit nonpayment without impairing the effect of the plea in the least; but if he makes such an admission, or if the plaintiff offers affirmative proof to the same effect, this is a complete reply to the presumption, and establishes the right to recover. If the evidence bearing on the fact of nonpayment is ambiguous or contradictory, a question is presented for decision in the usual manner; generally by the verdict of a jury.

The court then stated that neither party controverted the rules thus announced, "if the action were between individual litigants," and held that they were as applicable to a case in which the United States as plaintiff was suing for a debt as to a case between private parties. (223 Fed. 926, 929.) And this declaration of the law supplied the guide for the subsequent proceedings in the trial court.

The canal company itself did not deny in either of the lower courts, and does not here deny, that the presumption of payment arising from the lapse of time is rebuttable. (R. 264, 377; Canal Company's Brief below, p. 19; Brief in this court, pp. 4, 22–23,

56.) It urges, however, that the United States was bound "to explain the reason of the delay in making demand for payment." [1](Brief in this court, pp. 51–69.) This contention misconceives the true nature of the Government's duty—which was merely to prove that the dividends sued for had not been paid—and confuses the law respecting presumption of payment with that in reference to laches. The latter can have no application here, as it is settled beyond dispute that the Government is not chargeable with laches or delay on the part of its agents. (*United States* v. *Nashville Railway Co.*, 118 U. S. 120, 125; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Insley*, 130 U. S. 263, 266–267; *United States* v. *Dalles Military Road Co.*, 140 U. S. 599, 632; *Stanley* v. *Schwalby*, 147 U. S. 508, 514–515; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.)

[1] The attention of the court is invited to the fact that the company's contention in this regard is self-contradictory. At page 4 of its brief it recognizes that the duty which lay upon the Government at the trial was to rebut the presumption of payment. Pages 22 and 23 contain the same recognition, and at the latter page, in evident reliance upon the decision of the Circuit Court of Appeals in 223 Fed. 926, 929, the canal company states that "the Government was held bound *to show that the dividends had not been paid.*" [Italics ours.] Pages 23 to 51 are devoted to an attempt to show that the Government failed to perform this duty, and the conclusion is reached (p. 51) that "the Government have produced no evidence to rebut the presumption of payment." But "*if this evidence* [i. e., the Government's evidence] *was admissible*," the brief continues, "the strength of the presumption must be considered, as the canal company rest their defence entirely upon the presumption of payment which arises from two facts:

"1. The unexplained delay of the Government for over thirty-five years in making demand for payment.

"2. The failure of the Government to show that their claim was unpaid during the twenty years prior to bringing suit" (pp. 51–52).

Then follows a discussion (pp. 52–69) of the alleged duty on the part of the Government to explain the delay in making demand for payment, and

Therefore, as the Government was not under the imputation of laches, it would have been idle and

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the positions are successively taken by the canal company (*a*) that "the presumption of payment is *a rule of evidence* that is created by the unexplained delay of twenty years in instituting suit" and that *when the delay is unexplained* "the presumption has arisen *and must be answered* before the Government or the individual can recover" (p. 53); (*b*) that "the authorities quoted * * * show that unexplained delay of twenty years is a bar *unless there has been what is tantamount to an admission within twenty years before suit, that the debt remains unpaid*" (p. 54); (*c*) that when the Government "presents its claim which on its face is over twenty years old, *a rebuttable presumption* has arisen that this claim is paid, and *unless this delay is explained, or the presumption which has been created by it, answered*, there can be no recovery;" (*d*) that "to sum up this whole matter, under the authorities if the Government *has failed to explain* the delay of over thirty-five years * * * *or has not shown nonpayment* within twenty years, the presumption of payment becomes a bar to any rights of recovery" (p. 56); (*e*) that "in the eyes of the law [a claim] is paid, *unless some reason is shown why the plaintiff did nothing during that period*" (p. 59); (*f*) that "no court has held that *no* explanation is necessary" (p. 60); and finally (*g*) that *because "there is no allegation * * * that the claim of the United States has been recognized in any way by the canal company" and because "the delay * * * in making a demand for payment is unexplained,"* therefore "the presumption of payment which has been created by this lapse of time has not been rebutted, and the claim is paid in the eyes of the law, *whether such payment has been actually made or not*" (p. 69). [Italics ours.]

From these excerpts it is apparent that the canal company entertains no fixed conception as to what the Government's duty at the trial really was, or in reference to the true nature of the presumption upon which the company threw itself. Its confusion results from the impossibility of reconciling the presumption of payment with the palpable fact of non-payment. It urges with entire indifference the contentions that it was incumbent upon the Government *either* to explain its delay *or* prove non-payment of the debt; *both* to explain the delay *and* prove non-payment; and to prove non-payment *by explaining* the delay. And finally, though still admitting the rebuttable character of the presumption, the company asserts in substance that the Government's right to a recovery was contingent upon showing what was tantamount to an acknowledgment of the debt by the canal company within the last twenty years, and that it makes no difference in the eye of the law "whether payment has actually been made or not" (p. 69). These mixed contentions are equalled only by the uncertainty of the company's position at the trial. It there objected (R. 36–37) to the introduction by the Government of evidence of events in 1873 on the ground that such evidence could not rebut the presumption "which has arisen in the twenty years prior to the bringing of this suit." Conversely, it objected to "evidence as to facts that happened in 1913" (R. 49) on the ground that such evidence could not rebut "the presumption which arises by the lapse of twenty years from the date it [the Government's claim] was due."

stultifying to require it, as an independent duty, to explain the delay in demanding payment. The Circuit Court of Appeals clearly perceived the confusion involved in the position of the canal company upon this point and disposed of the contention in the following language, which leaves little further to be said (R. 374–375):

> * * * We do not agree, that before the Government could be allowed to prove the fact of nonpayment it was bound (as a separate obligation) to explain or excuse the delay. It is possible that the language used in some discussions of the subject will bear this construction, but even if this be true we do not find the point squarely decided, and in any event we are unable to see that the reason of the rule puts such an obligation on a delinquent creditor. *And, even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard.* But in the case of a private suitor also we think the defendant's contention is not sound. Loose expressions may have been sometimes used on this subject, but *if the presumption and the reasons of policy that sustain it be closely considered we think it will appear that after twenty years the issue between the parties continues to be what it was before, namely, Has the particular debt been paid?* When the statute of limitations is interposed as a defense, the

question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain that he has not been paid; but where the statute does not apply (and it does not in the present case), the issue of payment is the vital matter. Ordinarily, a plaintiff need do no more than prove the existence of his claim, whereupon the defendant must prove payment. But, if it appears from the evidence that the debt is of long standing, the plaintiff's task becomes progressively difficult, for the inference of payment may then be readily drawn from other circumstances; and, if the delay has lasted for twenty years, a definite presumption arises that is often the practical equivalent of the statute. Legally, however, it is not the equivalent; if he can, the plaintiff may always prove that he has not been paid, but his delay has somewhat changed the character of his task, and forces him to show reasons why the failure to sue should not be a bar. *These reasons may appear to be merely explanations or excuses, and may be so described without inaccuracy, but we think it equally accurate to say that they are really part of the evidence that tends by inference to show nonpayment.* For example, a dilatory plaintiff often proves the defendant's insolvency; this may be correctly spoken of as an excuse for delay, but just as truly it is a fact tending to show that the debtor has not paid because he could not pay. So, the absence of the debtor from the jurisdiction; this tends to show that he has not paid because he could not have been sued, and thus

compelled to pay. So, also, the near relationship between the parties; this tends to show nonpayment because it furnishes a reason why the plaintiff did not ask for the debt, or did not urge its payment. *As it seems to us, such matters as these become part of the plaintiff's task, but they are not conditions precedent to success. In the end, all he is bound to prove is nonpayment, and in fulfilling that obligation explanations or excuses are merely steps in the proof.* [Italics ours.]

The court then referred (R. 375–378) to a number of the cases relied on by the canal company in support of its contention that it was incumbent upon the United States to explain the delay in making demand for payment of the dividends and quoted typical language from one of them (*Sellers* v. *Holman*, 20 Pa. 321, 323–324). These cases in the main are the same as those now relied on by the canal company in this court. (Brief for the canal company, pp. 56–69.) Without discussing them in detail, they are, it is submitted, wide of the mark; they either involve the equitable defense of laches[1] (and so are doubly inapplicable here, since the present case was an action of assumpsit not involving equitable jurisdiction, and the United States, moreover, is not subject to the imputation of laches), or else they involve explanations or excuses for delay which had an *evidentiary* value on the question of payment or

[1] E. g., *Philippi* v. *Philippe*, 115 U. S. 151; *Bowman et al.* v. *Wathen et al.*, 1 How. 189; *Wagner et al.* v. *Baird et al.*, 7 How. 234. (Canal Company's Brief, pp. 56, 57, 58.)

nonpayment.[1, 2] Cases of the latter type, far from justifying the deduction which the canal company draws from them, in reality support the position of the Government, approved both by the District Court and by the Circuit Court of Appeals, that its only obligation at the trial, aside from showing the original existence of the debt, was to prove that it had never been paid.[3] Undoubtedly the correct rule on the subject is that stated by the Supreme Court of Pennsylvania in the very recent case of *Coleman* v. *Erie Trust Co.*, 255 Pa. 63 (1916), quoted in the opinion of the Circuit Court of Appeals (R. 376–377), but not referred to in the brief for the canal company. As four of the nine decisions cited by the company on this particular point (Brief, pp. 60–69) are from the State of Pennsylvania, this latest pronouncement of the Supreme Court of that State is specially apposite. The court said in the *Coleman case*, pp. 65–66:

[1] E. g., *Hillary* v. *Waller*, 12 Ves. Jr. 239; *Cope* v. *Humphreys et al.*, 14 Serg. & Rawle (Pa.) 15; *Miller* v. *Overseers of the Poor*, 17 Pa. Super. 159. (Canal Company's Brief, pp. 60, 62, 67.)

An exception, *Stover & Barnes* v. *Duren*, 3 Strob. (S. C.) 448 (Canal Company's Brief, p. 64)—where the position is taken that an acknowledgment or admission, in order to repel the presumption of payment, should be of such character as would suffice to take a case out of the statute of limitations—is clearly wrong.

[2] The canal company virtually admits (Brief, p. 53) that the United States is not bound by laches, but insists that "the Government *may lose its ability to prove its rights by reason of the neglect of its officers*"—which, of course, is true but irrelevant, as no such loss occurred in the present instance. And in any event, there still could be no possible obligation on the part of the Government, notwithstanding such impaired ability, to prove unessential facts which had no bearing upon its right to a recovery. Necessarily, the evidence required in any case must bear some relation to the substantive law of the case. Yet the canal company, disregarding this

The presumption of payment arising from lapse of time is not conclusive, *but is merely a presumption of fact which is rebuttable.* "The presumption is rebutted or, to speak more accurately, does not arise, *when there is affirmative proof * * * that the debt has not been paid*, or where there are circumstances that sufficiently account for the delay of the creditor." (*Reed* v. *Reed*, 46 Pa. 239, 242.) Further on in the same opinion Mr. Justice Strong said presumption from lapse of time "*is only an inference that the debtor has done something to discharge the debt, to wit, that he has made payment. Hence it is rebutted by simple proof that payment has not been made.* And the facts being established, whether they are sufficient to rebut it, is a question for the court, and not for the jury." In this instance

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axiomatic proposition, seeks to make "legal procedure" (p. 53) and the rules of evidence do duty in lieu of the doctrine of laches which it is unable to invoke; it asserts in effect that an explanation of the delay is an *evidential necessity* and says that a case like this can not be presented with the requisite certainty, "when the presumption of payment has arisen, unless the delay has been satisfactorily explained." (Canal Company's Brief, pp. 53-54.) Such contention is obviously without merit (or, if permissible at all under the possible circumstances of some hypothetical case, is matter for argument to the jury); for an "explanation," which the plaintiff in error deems so imperative, could have no greater probative force in repelling the presumption of payment than clear-cut direct proof of nonpayment—certainly no such *exclusive* probative force as to preclude the latter. If the latter is not precluded and is in fact produced there could then be no *necessity* of explanations as evidence of nonpayment.

[3] A few excerpts, culled from the canal company's own quotations, will serve to reinforce the Government's position:

From *Hillary* v. *Waller* (12 Ves. Jr. 239) (quoted in the Canal Company's Brief, pp. 60-61), page 265-266:

> The presumption in courts of law from length of time stands upon a clear principle; built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this; that a man will naturally enjoy what belongs to him. That is the whole principle. * * * It has been said, you can not presume, unless you believe. *It is, because there are no means of creating belief or disbelief*, that such general

there was affirmative proof that the judgment had not been paid, in the positive testimony of the plaintiff to that effect. The facts were not in dispute, and it was, therefore, for the court to say whether or not the judgment was a valid claim. In addition to the affirmative proof that the debt had not been paid, the cir-

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presumptions are raised * * *. Therefore upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, *where the circumstances are incapable of forming anything like belief*, the legal presumption holds the place of particular and individual belief. [Italics ours.]

From *Claim of Reside* (9 Op. Atty. Gen. 197) (quoted in the Canal Company's Brief, pp. 61–62), page 204:

* * * But the Government is bound, like anybody else, *by the rules of evidence and by the natural presumption arising from the facts of the case.* [Italics ours.]

From *Cope* v. *Humphreys et al.* (14 Searg. & Rawle (Pa.) 15), where the question was merely whether the trial judge had erred in not submitting a naked presumption of payment, unaccompanied by any rebutting circumstances, to the determination of a jury as an open question for their belief (quoted in the Canal Company's Brief, pp. 62–64), page 21:

* * * "The rule is in the nature of a statute of limitation, furnishing indeed not a legal bar, but a presumption of facts, and though not conclusive, yet prima facie evidence of it; *and therefore sufficient of itself to cast the burden of countervailing proof on the opposite party.* * * * The presumption is not subject to the discretion of a jury; they are bound, where it operates at all, to adopt it as satisfactory proof *till the contrary appears.*" * * * *If there had been any circumstances, anything but the lapse of time to charge the jury on, that should have been left to the jury;* but *where there was none* the presumption of law on that fact is, that the judgment was satisfied. [Italics ours.]

From *Sellers* v. *Holman* (20 Pa. 321) (quoted in Canal Company's Brief, pp. 65–66), page 323:

The court below instructed the jury substantially, that two notes, one of which was more than thirty and the other upwards of twenty-seven years old before suit brought, must be presumed to have been paid, *unless that presumption was met by something more than a mere naked demand of the debt by the obligee within twenty years.*

The only fair objection to the charge is that the judge has defended his positions too well. The question was not worth a tithe of the labor and learning he bestowed on it. [Italics ours.]

From *Miller* v. *Overseers of the Poor* (17 Pa. Super. 159) (quoted in Canal Company's Brief, p. 67), page 160:

After a lapse of twenty years, mortgages, judgments and all debts, no matter how solemn the instrument evidencing them may be, are presumed to be paid. And such presumption stands *until rebutted.* [Italics ours.]

> cumstances shown were such as to reasonably account for the delay. It appeared that the debtor was for years in straitened financial circumstances, and had but a small income, which would have been seriously disturbed had payment of the judgment been pressed. The relationship of father and son between the defendant and plaintiff was also a sufficient and natural reason for the delay of the latter in enforcing payment. [Italics ours.]

Assuming, however, that it were a part of the Government's duty to explain the delay in making demand for payment of its claim, such explanation appears from the evidence here just as in the *Coleman case, supra*. The peculations by the canal company's employees, their covering of their guilt by forging receipts and vouchers, and their deliberate withholding of notices advising the Government that dividends had been declared—notices having been sent on all former occasions—amply explain the long delay in suing for the debt.

A further question raised by the canal company should be here disposed of: At pages 54–56 of the company's brief the contention is made that the United States in becoming a stockholder of the company entered commerce and thereby descended from its sovereign position (p. 54) and that since it "can confer no rights upon the stock it holds, it must of necessity be confined to the rights which are vested in the stock itself, and those rights are the same for every other holder of stock in the same corporation" (pp. 55–56). Thence it is urged that "if every

stockholder must demand his dividends upon his stock within thirty-five years" or lose his right to them, "this must be true of all the shareholders, no matter who they may be" (P. 56). Conceding that the Government, when it becomes a suitor in one of its courts, is subject to the ordinary rules of procedure and evidence applicable to private litigants, this contention—designed to raise the *affirmative defense* of laches which the defendant did not raise at the trial, and which if raised would have been untenable—was sufficiently answered by the Circuit Court of Appeals in reviewing the first trial, where the same argument was advanced in reference to the statute of limitations. The court said (223 Fed. 926, 928):

> * * * the fallacy of the company's argument seems to lurk in the assumption that in this action the Government is asserting a right in its character as a stockholder. Undoubtedly the right came into being because the Government owns the stock, but in no other respect has the suit anything to do with such ownership. The Government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered. The right set up is a right to recover a sum of money from the company, and could be urged quite as effectively by an assignee of the dividends, although he might never have been a stockholder at all.

II.

THE EVIDENCE INTRODUCED BY THE GOVERNMENT TO SHOW THAT THE DIVIDENDS SUED FOR HAD NEVER BEEN PAID WAS COMPETENT FOR THE PURPOSE.

The Canal Company's assignment of errors (R. 379 et. seq.) contains 12 assignments (Nos. 1 to 12, inclusive, R. 379–388) which question the correctness of rulings at the trial on matters of evidence.

Of these, No. 12 (R. 388) attacks the Government's right to introduce the forged receipts and vouchers found in the Canal Company's files (Gov. Exs. Nos. 11, 12, 13, 14, and 66, R. 287–289, 300) and to use certain photographs—not reproduced in the record (R. 290)—in proving that the papers were forgeries (R. 71, 95–97). Whilst this assignment is reprinted in the Canal Company's brief (p. 12) as one upon which the company relies in this court, no portion of the brief is addressed to the support of it, and it may be disregarded.

Assignments Nos. 1 to 11—of which No. 2 appears to be abandoned (Canal Company's brief, pp. 5–6)—all relate to the use of certain records of the Treasury Department (Gov. Exs. Nos. 78 to 91, inclusive) in connection with the testimony of the witness Pearson, an employee of the department (R. 200). They lay the foundation for the contentions made by the Canal Company in its brief (pp. 29, 37)—

(*a*) That the Treasury records used by Pearson were inadmissible for the purpose of showing, as evidence of nonpayment, the *absence* of any entries in them

indicating payment, although such entries should have appeared if the dividends had been paid; and

(*b*) That some of the records (Gov. Exs. Nos. 78 to 86, inclusive, and No. 91) were further incompetent because (the Canal Company asserts) they were not originals or certified copies of originals.

In order to discuss intelligently the competency of Pearson's testimony and the Treasury records to which he referred, it is desirable to have in mind what the Government had already proved:

It had proved that the money appropriated by the Canal Company for the payment of the dividends of 1873, 1875, and 1876 was embezzled by the officer of the company in charge of the fund and another employee of the company who conspired with him (R. 121 et seq., 137–139).

It had produced, from the files of the Canal Company, where they were found mixed with genuine vouchers for earlier dividends (R. 45–46, 53–54, 68), the following papers:

> A paper purporting to be a paid draft dated October 26, 1874, drawn by J. F. Hartley, Acting Secretary of the Treasury, upon Henry V. Leslie, treasurer of the Canal Company, for the amount of the dividend of 1873 (R. 39; Gov. Ex. No. 12, R. 288); the Canal Company's dividend receipt book containing what purported to be a receipt dated October 30, 1874, for the amount of that dividend signed "Wm. Y. Beale," a fictitious name (R. 38, 136–138; Gov. Ex. No. 66, R. 300);

A paper purporting to be a letter to Henry V. Leslie, secretary and treasurer of the Canal Company, dated November 19, 1875, from the Treasury Department, signed "A. V. Holmes, Asst. Sec'y," a fictitious name (R. 177, 179–180), professing to acknowledge the receipt of a letter from the former dated November 17, 1875, containing a check of the same date for the amount of the dividend of 1875 (R. 40; Gov. Ex. No. 11, R. 287); also a pretended receipt from the Canal Company's receipt book for the amount of that dividend dated November 19, 1875, and signed "Henry V. Leslie, Atty." (R. 38, 136–138; Gov. Ex. No. 66, R. 300);

Also what purported to be a letter to Henry V. Leslie, secretary and treasurer of the Canal Company, from the Treasury Department, dated November 27, 1877, signed "Charles W. Hayes, Asst. Sec'y," a fictitious name (R. 177, 179–180), advising the company that a sight draft for the amount of the dividend of 1876 had that day been forwarded for collection to the Assistant Treasurer of the United States at Philadelphia (R. 42; Gov. Ex. No. 14, R. 289); also a paper purporting to be a paid draft, dated November 27, 1877, signed "Charles W. Hayes, Assistant Sec'y," for the amount of the dividend (R. 43; Gov. Ex. No. 13, R. 289); also a pretended receipt in the Canal Company's dividend receipt book for the dividend in question dated December 5, 1877, and signed "Wm. Y. Beale" (R. 38, 136–138; Gov. Ex. No. 66, R. 300).

It had shown that these papers were exhibited by the Canal Company to agents of the Treasury Department on at least three different occasions in 1913 and 1914 as the company's papers evidencing payment of the dividends (R. 46, 54, 67–68, 98–99). It had then shown that the papers were not genuine receipts and vouchers but were forged productions made and placed in the files of the company by the persons who had embezzled the company's funds (R. 58–60, 64–65, 69–75, 77-79, 90–97, 181, 129–136); and one of the participants in the crime (the other being dead, R. 139–140) had explained the forgeries, testifying that he and the treasurer of the company had withheld from the Government the customary notice of the declaration of the dividends and that to his personal knowledge the dividends had not been paid by the company prior to 1886 when he left the company's service (R. 125–137).

The Government had then shown that the Treasury Department had received due notice from the canal company of the declaration of all earlier dividends (fourteen in number), but that a thorough search of the department's files failed to disclose any notice of the dividends in suit. (R. 159–164; Gov. Exs. Nos. 67, 68, 69, R. 301, 309, 310.)

It had also shown that the Treasury Department had a complete record of the payment of these fourteen earlier dividends, beginning with the first, which was declared and paid in 1853, and ending with the fourteenth, which was declared in Decem-

ber, 1872, and paid during the following year. (R. 165 et seq., Gov. Ex. No. 92, R. 335, 340; Gov. Ex. No. 77, R. 317, 334.) It had shown by a qualified witness, Mr. O'Reilly, who had been more than twenty-one years in the service of the Government (R. 173), the manner in which the dividends that *were* paid had reached the Treasury and been accounted for, and in which those now sued for would normally have been paid and accounted for if they had in fact been paid. (R. 165–175.)[1]

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[1] O'Reilly, testified as follows, taking as an example the dividend of 1871 (R. 165–170):

A. Perhaps I should ask if the purpose is to have me take up the course which began with the receipt of the notice?

Q. Yes, certainly.

* * * * *

A. On the receipt of this paper [notice of the declaration of a dividend], which I understand is in evidence, the Treasury Department proceeded to draw a draft.

* * * * *

A. I am speaking now of a notice written on a letter head, reading "Office, Chesapeake and Delaware Canal Company, 417 Walnut Street, Philadelphia, October twenty-fifth, 1871."

Q. That is one of the notices produced by Mr. Collins?

A. Yes, sir; addressed to Honorable George S. Boutwell, Secretary of the Treasury, Washington, D. C.; and signed "Respectfully yours, Henry V. Leslie, Treasurer." (Exhibit No. 67, R. 301, 306.)

By the COURT:

Q. He states the fact of the dividend and the amount?

A. Yes, sir. "The proprietors of this company have declared a cash dividend on the outstanding capital stock of the company of one dollar and fifty cents per share. The amount due the United States Government is twenty-one thousand nine hundred and thirty-seven dollars and fifty cents. This sum is now subject to your order, either by sight draft or otherwise. Respectfully yours, Henry V. Leslie, Treasurer."

Q. What was the order of events after that? What was done next?

A. The Secretary of the Treasury then drew a draft upon Henry V. Leslie, esquire, Treasurer of the Chesapeake and Delaware Canal Company * * *.

At the same time a letter was written to the assistant treasurer. I am speaking now of the general course that was followed in this case.

Q. Written by whom?

It had produced from their proper custody in the Division of Public Moneys of the Treasury Department the transcripts of account rendered by the

A. By the department and signed similarly, "J. F. Hartley, acting secretary," addressed to the Assistant Treasurer of the United States in Philadelphia, inclosing to him for collection the draft which the department had prepared and drawn upon the treasurer of the canal company. On receipt of that draft at the office of the Assistant Treasurer at Philadelphia—I might say that there were—although I am not prepared to say it was uniformly done, or that it was done invariably, but that it was generally done—a notice sent on the same day to Henry V. Leslie advising him of the drawing of the draft and the authorization of the Assistant Treasurer in Philadelphia for collection. On receipt of the draft at the office of the Assistant Treasurer at Philadelphia, presumably, it was presented to the company, *and on the date of his presentation and the receipt by the Assistant Treasurer of the amount of the dividend, he would issue two certificates of deposit certifying that he had received the amount of that dividend as described,* as representing money which was a dividend of the Chesapeake and Delaware Canal Company. *Those certificates of deposit the Assistant Treasurer at Philadelphia would transmit to the Secretary of the Treasury, and at the same time he would prepare, or he would make an entry in his daily transcript of receipts at the office of the Assistant Treasurer at Philadelphia,* in which the amount of the draft which he had collected—which sometimes was described specifically with date of the letter and date of the draft—would appear.

By Mr. BIDDLE:

Q. What would you call that?

A. *A daily transcript of the accounts.* I might explain that, that the situation is this: That all of the monies received by the Assistant Treasurers, throughout the United States, whether in Philadelphia, or elsewhere, are deposited to the credit of the Treasurer of the United States, because all public monies are subject to his draft, and, therefore, monies deposited in all of these places are placed to the Treasurer's credit, and the Assistant Treasurer reports that as money received in account with the Treasurer of the United States. That is the character of the daily transcript to which I have just referred.

On receipt of the daily transcript at the department and of the certificates of deposit, they were checked together to see that there was no omission from the daily transcript of any certificate of deposit which had been issued at any of the depositaries. That being verified, the certificates of deposit were made the basis of a list, known as a deposit list, that was prepared in the Division of Public Monies and forwarded to the Division of Bookkeeping and Warrants. At the time of this occurrence the division was known as the Division of Warrants, Estimates, and Appropriations.

On receipt of the deposit list containing the fund set out in the certificate of deposit, that Division of Warrants, Estimates, and Appropriations prepared a

Assistant Treasurer at Philadelphia to the Secretary of the Treasury, containing entries showing payment of all the 14 dividends declared by the canal

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warrant which is known as a covering warrant, a formal cover for money into the Treasury for charge against the Treasurer of the United States. That fixed his accountability to the United States for monies received. *Those warrants were registered in a register of the Division of Warrants, Estimates, and Appropriations and passed over to the Division of Public Monies for notation by them of the number and date of the warrant which took up and covered into the Treasury the amount represented by the various certificates of deposit.* After the preparation of this warrant, it was signed by the Secretary of the Treasury, passed by him to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books containing these matters, and he countersigned the warrant. *The warrant then passed from the Comptroller to the Treasurer of the United States, who acknowledged at the bottom of the warrant the receipt of the sum of money named in the warrant. A warrant should show for each specific particular payment that was made. The treasurer then, at the expiration of the quarter in which these transactions occurred, prepared for submission and audit by the Auditor of the Treasury Department, his accounts of all monies received by him within the quarter,* and also containing a claim for credit for all pay warrants that he had paid, money that he had disbursed within the same period.

That account was made up and bound in book form and transmitted by the Treasurer to the Auditor for the Treasury Department for examination and audit. On that the Auditor examined and settled the account and made a certificate of his balance due to the United States, based upon the warrants issued by the Secretary of the Treasury. The Treasurer's account, by entering the warrant account, was charged with all monies going into the Treasury by a covering warrant and credited with all warrants which he paid, that was issued by the Secretary of the Treasury and drawn upon the Treasurer of the United States.

By Mr. NIELDS:

Q. Were all the fourteen dividends paid upon draft such as you have described?

A. All were so paid.

Mr. C. BIDDLE. Only speak of what you know.

A. (continued). I know it from examination of the accounts and records. Of course, not from personal knowledge. All of the fourteen dividends were paid upon drafts drawn by the Treasury Department and sent to the Assistant Treasurer at Philadelphia for collection, with the exception of the second dividend, which was treated in a slightly different way. In that case the department having been advised of the declaration of a dividend in 1866, there having been none declared between 1853 and 1866, immediately instructed Mr. Leslie to deposit that amount with the Assistant Treasurer at Philadelphia; and that transaction was carried out in that manner, the letter of instructions being considered and accepted as a draft.

company prior to 1873 (R. 167–168, 183–184). It had shown by Miss Howgate, an employee of the Treasury Department since 1888 (R. 80), who produced these documents, that she had searched the files for certificates of deposit and transcripts covering the payments purporting to be evidenced by the papers taken from the canal company's files, but had been unable to find any (R. 184–186). The transcripts of account covering the dates in question were found and produced (Gov. Exs. Nos. 75, 76, R. 313, 315), but they contain no such entries. The Government had further shown by Miss Howgate that there is kept in the Treasury Department a record in which certificates of deposit issued by the Assistant Treasurer at Philadelphia are contemporaneously recorded as received, and that she had searched this record, covering the period from January, 1870, to December 31, 1877, but had found no entry of the receipt of dividends declared in 1873, 1875, and 1876. (R. 187.)

The Government had also shown by O'Reilly that he had examined all appropriate places in the Treasury Department in which a record should be found of the receipt of a check from the canal company of November 17, 1875, as purported to be shown by the papers taken from its files, and that no record of any such check could be found. (R. 172–173.)

The Government had produced the original covering warrants (Gov. Ex. No. 77, R. 317–334; 1 Stat. 66, §4; R. S. §305), by which the payments

for the 14 earlier dividends were formally covered into the United States Treasury and the Treasurer of the United States debited with their amount—these warrants having been prepared in the Division of Warrants, Estimates and Appropriations (now the Division of Bookkeeping and Warrants) from the certificates of deposit issued by the Assistant Treasurer at Philadelphia at the times when the dividends were paid, the certificates being first checked against the Assistant Treasurer's daily transcript of account to insure accuracy (R. 167–169, 195–197); and had also shown by Miss Brady who for more than 20 years past has been in charge of the files for the Auditor of the Treasury (R. 179), that she had searched for additional covering warrants for subsequent deposits of any sums of money on account of dividends paid by the canal company to the United States from May 9, 1873 (the date of the last of the 14 warrants), through the year 1877, but had found none; also that she had searched the quarterly accounts rendered and authenticated by the Treasurer of the United States, covering the same period (1 Stat. 65, 66, §4; R. S. §305, 311), in which should appear entries of the dividends if paid, but that no such entries were found. (R. 199.)

Having offered the foregoing evidence, all of which is unrefuted, and none of which, as above shown (p. 18), is seriously questioned by any assignment of errors, the Government introduced its last witness,

Pearson, an employee of the Treasury Department, who had been in its service since June, 1865 (R. 200), and who testified, by reference to certain records of the department, that they contained no entries showing payment of any of the dividends in suit from 1873 to the commencement of this action, although such entries should have appeared therein if the dividends had been paid.

The objections to Pearson's use of these records will now be considered. In our treatment of them we prefer to reverse the order in which they are presented by the canal company. (Brief, pp. 29, 37.)

FIRST. THE RECORDS USED BY PEARSON WERE AUTHENTIC PUBLIC RECORDS OF THE TREASURY DEPARTMENT, AND AS SUCH WERE COMPETENT EVIDENCE.

The canal company contends that the Treasury records (or some of them) to which Pearson referred in testifying were not originals or certified copies of originals, and that they were therefore inadmissible for any purpose (Brief, pp. 37–51). It concludes its discussion of this point with the statement (p. 51) that under the authorities cited "the reports admitted in this case were not shown to have any of the incidents of public documents; they are not the books of original entry, and therefore were inadmissible for any purpose." In answer to this, it may be confidently asserted that there are not, in the whole range of public documents, any records which bear more unmistakably the impress of their public character. (Constitution of the United States, Art. I, § 9, clause 7; 1 Stat. 65; R. S. §§ 305, 313; act of July 31, 1894, c. 174, § 10, 28 Stat. 208.)

The records concerning which Pearson testified are Government Exhibits Nos. 78 to 91, inclusive, certain books of the Treasury Department which are not reproduced in the record.

Of these, Nos. 87 to 90, inclusive, should be considered first. They were four volumes styled "Registers of Miscellaneous Revenue Warrants" (R. 245). They covered the period from July 1, 1872, to December 31, 1878 (R. 226–227; 245–246), and were produced by the witness from the Division of Bookkeeping and Warrants of the Treasury Department, where they were officially kept in his custody.[1] They were the original records (R. 246) in which were entered the warrants (prepared by the Division of Bookkeeping and Warrants, R. 168) by which all miscellaneous revenues of the United

[1] They were actually made, however, in the office of the Register of the Treasury, for R. S., § 313 (since repealed by the act of July 31, 1894, c. 174, §10, 28 Stat. 208, commonly known as the Dockery Act), made it the duty of the register—

First. To keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United States. * * *

Third. *To record all warrants for the receipt or payment of moneys at the Treasury, and certify the same thereon,* except those drawn by the Postmaster General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments.

The Dockery Act, of July 31, 1894, c. 174, §10, repealed R. S., § 313, and provided (§10):

"The Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the Treasury is hereby recognized and established as the Division of Bookkeeping and Warrants. It shall be under the direction of the Secretary of the Treasury as heretofore. *Upon the books of this division shall be kept all accounts of receipts and expenditures of public money,* except those relating to the postal revenues and expenditures therefrom; and section three hundred and thirteen and so much of sections two hundred and eighty-three and thirty-six hundred and seventy-five of the Revised Statutes as require those accounts to be kept by certain auditors and the Register of the Treasury are repealed." (28 Stat. 208.)

States are formally covered into the Treasury of the United States and the United States Treasurer charged with accountability therefor to the United States (R. 168, 245–246).

Pearson testified that dividends on stock owned by the United States are classed as miscellaneous revenues (R. 228), and that these four volumes of "Registers of Miscellaneous Revenue Warrants" should contain entries of warrants covering the receipt of dividends, if any, paid by the canal company to the United States during the period to which the volumes relate (1872–1878); that they did contain entries showing payments of the thirteenth and fourteenth dividends (declared in June and December, 1872, and paid respectively in November, 1872, and May, 1873, Govt. Ex. No. 77, R. 317, 331, 333), but contained no entries showing the receipt by the Government of any subsequent dividends from the canal company. (R. 247, 251–253).

The witness testified that it was his duty, among others, to prepare and record the receipt covering warrants of the department. Whether he made the particular volumes of registers here in question does not positively appear from the record, but the testimony amply supports the inference that he did so. He testified that since 1868 he had not lost a day from the Treasury Department (R. 205), and that at that time he was employed on the books of the register's office. He was transferred to the division of bookkeeping and warrants in 1895 (R.

205)—the time when that division took over the work formerly done by the register's office.

These books were kept pursuant to law and official regulations.

From the foundation of the Government the statutes of the United States have required that receipts and disbursements of the Treasury shall be upon warrants signed by the Secretary of the Treasury, and that without such warrants, so signed, no acknowledgment for money received into the public treasury shall be valid.[1] (Act of Sept. 2, 1789, 1 Stat. 65, §4; R. S. §305.)

R. S. §305, which was in force at the time when the exhibits complained of were made, remains the law at the present time, except that so much thereof as required the Register of the Treasury to record the warrants mentioned in the section was repealed by the Dockery Act of July 31, 1894, c. 174, §11, 28 Stat. 209, and with the further exception that the office of second comptroller was abolished and the designation of the first comptroller changed to

[1] R. S. §305 (Comp. Stat., 1916, §478), which is derived from the act of September 2, 1789, c. 12, §4, provides as follows:

"*The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either comptroller, and recorded by the register, and not otherwise.* He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. He shall render his accounts to the first comptroller quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secretary of the Treasury and the first comptroller, or either of them, the inspection of the moneys in his hands."

Comptroller of the Treasury and he was to perform the duties of the office of second comptroller (28 Stat. 209, §4).

At the time when Exhibits 87 to 90 were made, R. S. §313 (since repealed, *supra*, p. 28, note), was in force, and provided:

> SEC. 313. It shall be the duty of the Register:
>
> First. To keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United States.
>
> * * * * *
>
> Third. To record all warrants for the receipt or payment of moneys at the Treasury, and certify the same thereon, except those drawn by the Postmaster General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments.
>
> * * * * *

The law also provided, and still does (R. S., §305), that—

> The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, * * *. *He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment of money received into the public Treasury shall be valid.* [Italics ours.]

Exhibits 87 to 90 were made pursuant to these statutes. As they were the original records of the warrants which afford, as it were, the only ingress to the Treasury, they may properly be regarded as the original fiscal records of the Government. And as they were brought direct from their proper custody in the Treasury Department by the employee of the department in charge of them, there can be no question as to their authenticity.

In addition, it is provided by Revised Statutes, §236 (derived from the early act of Mar. 3, 1817, c. 45, §2, 3 Stat. 366) that—

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

Under this statute and Revised Statutes, section 305, *supra*, any payment made by the canal company to the Government would of necessity appear in the Registers of Warrants. What becomes, then, of the canal company's suggestion (Brief, pp. 39–40) that these records should have been rejected and that the Government might have produced better records, as, for example, the books of the subtreasury at Philadelphia? Indeed, in view of the statutes which govern the Treasury Department's system of accounting, it may be asked, What becomes of the presumption of payment of the dividends here in suit?

Could they have been paid without a permanent record being made?

But in addition to Exhibits 87 to 90 being clearly admissible as the most original evidence that could have been adduced, their admissibility rests upon a still broader base—*the fact that they are public records.* This characteristic they share in common with the other exhibits referred to by the witness Pearson, which we now take up.

Government Exhibits Nos. 78 to 86, inclusive, comprise nine printed volumes. They were entitled "Receipts and Expenditures of the United States" (R. 211). They were produced by the witness from the Division of Bookkeeping and Warrants, where they were kept in his official custody (R. 211–213). They are compilations year by year from 1872 to 1914, inclusive, of the receipts and expenditures of the Government (R. 225–226; 229–230). The witness had assisted in making them (R. 213, 214). They were made from entries in the Register of Warrants (R. 225–226; 229–230), one particular series of which, namely those covering miscellaneous receipts, has just been described. As Exhibits Nos. 78 to 86 include not only miscellaneous receipts but also other classes of the public revenues, and expenditures as well, they are of course drawn from a wider range of registers than the "Registers of Miscellaneous Revenue Warrants," *supra*. As every receipt or disbursement of the Treasury, however, must be evidenced by a warrant as already shown,

and as by requirements of law these warrants must all be registered in the Division of Bookkeeping and Warrants (Act of July 31, 1894, c. 174, §10, *supra*) the division has the necessary original data from which to make complete and authoritative compilations of the Government's receipts and expenditures. The compilation for each year is entitled "Combined Statement of the Receipts and Disbursements (apparent and actual) of the United States for the Fiscal Year ended June 30," etc. (R. 202, 367), and is preceded by a letter from the chief of the division to the Secretary of the Treasury (R. 235, 368), which declares that the compilations contain—

> * * * The receipts and disbursements of the Government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, * * * exhibiting the various sources of the revenues, the apparent expenses of each branch of the service under the several departments, and of each department on account of "Salaries," "Ordinary expenses," "Public works," "Miscellaneous," and "Unusual and extraordinary"; and the actual expenses of the same and the *actual* revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not *actual revenues* or *true expenditures* and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury.

It appears further that these printed compilations are the statements which the Secretary of the Treasury transmits annually to Congress. (R. 213, 236, 368; 1 Stat. 65, 66; 26 Stat. 511.)

Pearson testified that these books should properly contain entries showing the receipt by the Government of payments of dividends, if the payments had in fact been made (R. 230, 228); that he had examined the books for the purpose of ascertaining any such entries for the dividends of 1873, 1875, and 1876, and that none were found. (R. 245.)

Finally, Government Exhibit No. 91 is a compilation of *all* the Government's miscellaneous receipts from the year 1791 brought together under appropriate headings, such as "Conscience fund," etc. (R. 229; 227–229; 247–248; 250.) Like the other exhibits referred to by the witness, the book was produced by him from the division of bookkeeping and warrants, where it is kept in his official charge. Its function is to facilitate the expeditious answering of inquiries (R. 228, 248). It was compiled—in part by the witness (R. 228)—by making postings from the annual compilations of receipts and expenditures already mentioned (R. 259). The witness's testimony justifies the inference, also, though this does not certainly appear, that the entries in Exhibit 91 are also checked against the entries in the original registers of warrants from which the annual compilations are made (R. 247–252). As already shown, dividends on stock held by the Government are classed as mis-

cellaneous revenues (R. 228), and Exhibit 91 contains an appropriate heading under which are entered dividends on stock held by it in the Chesapeake & Delaware Canal Company (R. 254). The witness testified that the book would normally contain "an entry showing a receipt by the United States of any payment on account of dividends by the Chesapeake & Delaware Canal Company after June 1, 1873" (R. 250, 251–253). There is, however, no such entry (R. 250), although entries appear covering all the fourteen earlier dividends. (R. 258.)

The canal company insists that these exhibits are not public documents and not books of original entry (Brief, pp. 39–40, 48–51). And at the trial they were referred to by counsel for the company as "a registry only of the private affairs of this Government, and not in any sense public documents." (R. 231.) The fallacy of the company's position thus consists in an attempt to force these records into the narrow limits of the law respecting "shop books." In reality they are not shop books and were not offered as such (R. 235–236), but are public records of the very highest order, deriving their character as such from the Constitution itself, and from statutes running back to the beginning of the Government.

The Constitution, Article I, section 9, clause 7, provides that—

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; *and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.*

It would be strange indeed if the records of the Treasury Department published under this high sanction are, as alleged by the canal company, nothing but a "registry of the private affairs of this Government" (R. 231). No analogue of the requirement that regular statements and accounts of the Treasury shall from time to time be published is to be found elsewhere in the whole Constitution save in the provision of Article I, section 5, which provides that "each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy * * *." A little reflection demonstrates the fundamental importance of the requirement, and the evils which might result if it had been omitted from the Constitution.

Tucker, in his work on the Constitution, says in reference to it, volume 2, page 664:

> The last provision of this clause was fully commented on in the convention: That the people by *public reports* from time to time should be made aware of the collections of money as well as its disbursement.

At the first session of Congress, and among the first acts passed, Congress vitalized the provision by providing (Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65):

> That it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit;

> to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns * * *; *to make report and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives,* or which shall appertain to his office * * *." [Italics ours.]

The act of September 2, 1789, was supplemented by various other statutes, some of which became embodied in Revised Statutes, § 257. And later statutes have made the duty of the Secretary of the Treasury to prepare and render these annual compilations still more definite. Thus, by act of September 30, 1890, c. 1126, § 1, 26 Stat. 511 (the deficiency appropriation act for the fiscal year 1890), Comp. Stat., 1916, § 387, it was provided:

> Hereafter the Secretary of the Treasury shall include in his annual report, in the statements of actual and estimated receipts and expenditures of the Government, the revenues from and expenditures on account of the Postal Service.

By another statute (Act of July 31, 1894, c. 174, § 15, 28 Stat. 210, the Dockery Act, already referred to), Comp. Stat. 1916, § 388, it is provided:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof,

> *an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation.*

The statutes cited and the course of administrative practice under them establish beyond any question the true nature of the exhibits referred to by the witness Pearson, even if the language of the Constitution did not suffice to do so. Nor could it be reasonably asserted that because Exhibits 87 to 90 and Exhibit No. 91 were not, like Exhibits Nos. 78 to 86, inclusive, transmitted to Congress, they are therefore to be differentiated from the latter. All are in *pari materia;* all are necessary adjuncts to the conduct of the public fiscal business of the Government in keeping with the requirements of law.

Again, it can hardly be supposed that these records of the Treasury Department, made pursuant to the direct mandate of the Constitution and supplementary statutes are to be accepted as public documents by Congress and the executive branch of the Government, yet rejected as public records by the courts.

The language of the Circuit Court of Appeals, we think, expresses the correct judicial attitude. That court said (R. 372–373):

> We shall not discuss at length the question whether the ten exhibits complained of were

admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence. We understand the general rule to be, that when a public officer is required either by statute or by the nature of his duty to keep records of transactions occurring in the course of his public service, the records thus made either by the officer himself or under his supervision are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination.

As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and moreover are made in the discharge of a public duty and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage.

The competency of the class of evidence here involved is also fully recognized by this court. *Bryan et al.* v. *Forsyth*, 60 U. S. (19 How.) 334, 338; *Gregg* v. *Forsyth*, 65 U. S. (24 How.) 179; *Post* v. *Supervisors*,

105 U. S. 667, 670–671; *Oakes* v. *U. S.*, 174 U. S. 778, 793, 796; *Holt* v. *United States*, 218 U. S. 245. In the last case it was stated (p. 252):

> The witness relied in part *upon the correctness of official maps in the Engineer's Department made from original surveys under the authority of the War Department*, but not within his personal knowledge, *and he referred to a book showing the titles to Fort Worden compiled under the same authority.* The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, * * *.

The foregoing passage is unambiguous, not equivocal as the canal company suggests (Brief, pp. 41–42); it is clear that the court was referring as well to the maps and books as to the deeds which it had previously mentioned.

In *Oakes* v. *United States*, *supra*, where the question was (p. 793) whether the Court of Claims had erred in reaching findings of fact by reference to certain papers in the Confederate Archives Office, this Court said (p. 796):

> It would be an anomalous condition of things if records of this kind, collected and preserved by the Government of the United States in a public office at great expense, were wholly inadmissible in a court of justice to show facts of which they afford the most distinct and appropriate evidence, and which, in the nature of things, can hardly be satisfactorily proved in any other manner.

To the same effect see:

Stewart v. *United States* (C. C. A. 9th), 211 Fed. 41; *Wigmore on Evidence*, vol. 3, sec. 1684.

In view of what has been already shown, the authorities relied on by the canal company (Brief, pp. 40–51) require no extended consideration. They bear only a remote resemblance to the present case and are readily differentiated. In *Marks* v. *Orth*, 121 Ind. 10 (canal company's brief, p. 42), the document or pamphlet referred to as inadmissible was rejected *on the ground that there was no proof of its authenticity;* that case, therefore, has no relevancy here. The exhibits in this case were produced directly from their official custody, so that no question of authenticity can arise. *United States* v. *Pinson*, 102 U. S. 548 (canal company's brief, pp. 43–44), also, is not in point; it merely involves consideration of the statutory methods prescribed for the adjustment of accounts between the Treasury Department and fiscal officers of the Government. So with *Mercer* v. *Dunn*, [1904] 2 Chancery, 534 (canal company's brief, p. 49): There the documents which were tendered in evidence and rejected were "confidential reports" which the court thought dangerous to admit as evidence of public rights. In *Hegler* v. *Faulkner*, 153 U. S. 109 (canal company's brief, p. 50), the list referred to was not a record "intended as a mode of preserving the recollection of facts"—the antithesis of the situation here. Again, in *Cushing* v. *Nantasket*

Beach Railroad, 143 Mass. 77 (canal company's brief, pp. 50–51), involving the question of a printed document entitled "48 Congress; 1st session; Senate Ex. Doc. No. 74," its exclusion from the evidence was on the ground of its irrelevancy to the issues.

SECOND. GOVERNMENT EXHIBITS NOS. 78 TO 91, INCLUSIVE, WERE COMPETENT TO SHOW BY THE ABSENCE OF ENTRIES THEREIN THAT THE DIVIDENDS SUED FOR HAD NOT BEEN PAID.

It only remains to inquire whether Exhibits Nos. 78 to 91, inclusive, were competent not only for the purpose of showing entries, but for the further purpose of showing by the absence of entries therein that the dividends sued for were never paid. In view of the nature of the records, and of the statutory requirement pursuant to which records must have been made if there had been payments, this question would seem to answer itself.

The rule applicable to the proof of facts by reference to the absence of entries is stated as follows by Wigmore in his work on Evidence, volume 3, section 1633 (6):

> Since the assumption of the fulfillment of duty is the foundation of the exception (public document exception to hearsay rule), it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur; *or, to put it in another way, the record taken as a whole, is evidence that the matters recorded, and those only, occurred.* [Italics ours.]

To the same effect are: *Chamberlayne, Modern Law of Evidence*, volume 3, section 1758; *16 Encyclopedia of Law and Procedure*, 1120–1121, where the proposition is deduced from many cited cases; *United States* v. *Teschmaker et al.*, 63 U. S. (22 How.) 392, 405; *American Surety Co.* v. *Pauly*, 72 Fed. 470, 478, and *Knapp* v. *Day*, Col. (1893), 34 Pac. 1008.

Where, as here, the records produced are official records kept pursuant to law, the rule that they are competent to show by the absence of entries, the nonexistence of a state of facts which they should show if the facts had really occurred, is an inevitable corollary of the presumption of regularity that attached to the performance of official duty. (*Chesapeake & Delaware Canal Co.* v. *United States*, 240 Fed. 903, C. C. A. 3d; R. 373.)

The canal company, referring to the case of *United States* v. *Teschmaker*, 63 U. S. 405 (Brief, pp. 29–30), states that "the plaintiff produced a paper which recited it had been placed upon the record" and that the court properly "permitted the record to be produced to show that such statement was untrue." Such was the situation in the trial of this case: The existence of the forged papers in the canal company's files challenged the records of the Treasury Department; the very *presumption of payment* challenged the department's records, for by the Federal Statutes a payment of money to the United States could not occur without a corresponding record. The Government was entitled to accept the challenge.

III.

THE GOVERNMENT INTRODUCED EVIDENCE WHICH CLEARLY SHOWED THAT THE CLAIM IN SUIT HAD NOT IN FACT BEEN PAID. THE VERDICT OF THE JURY AND THE FINDING OF THE CIRCUIT COURT OF APPEALS ARE CONCLUSIVE.

Assuming its competency, the only remaining inquiry is whether the evidence was sufficient to justify the verdict of the jury.

The District Court, in refusing the canal company's request to direct a verdict for the defendant (R. 263, 266) and in denying its application for a new trial (R. 5), answered this question in the affirmative.

The Circuit Court of Appeals, after an exhaustive summary of the evidence,[1] expressed itself as follows (R. 378):

> * * * concerning the present record we shall say nothing more, except that *a careful*

[1] The Circuit Court of Appeals summarized the evidence as follows [R. 366–372, 378]:

* * * On the second trial the Government offered additional evidence to the following effect:

That fourteen dividends had been declared before 1873, and had been paid to the United States; that the company had given due notice of these dividends—the notices themselves and copies of the Government's replies being produced by the Treasury; and that no notices of the dividends in question were on file in the Department [R. 54, 159–164, 183; Gov. Exs. Nos. 67, 77]:

That, after the beginning of the suit, a Government agent had examined the company's books and papers, and had discovered on its files forged vouchers for these three dividends purporting to be signed by an officer of the United States; and had discovered also forged receipts therefor on the dividend-receipt books— these facts being explained by a witness, formerly in the company's service, who testified that he had been a party to these forgeries, and that he and the company's treasurer had embezzled a large sum of money during the years in question; that no notices of these dividends had been sent to the United States, and that no payment thereof had been made by the company before he left the company's service in 1886. [R. 46–58, 68, 121–139.]

It was also testified by witnesses employed in the Treasury, that certain books (produced at the trial) were kept officially in the department, and

study has satisfied us not only that the trial judge could not properly have directed a verdict for the company but also that the evidence carries clear

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contained entries relating to public moneys during the period from 1872 to 1914; that in the usual course these books would, or at least should, contain entries relating to money paid into the Treasury from any source whatever, but that no entry of the dividends in question appeared therein. These books were nine in number (Exhibits 78 to 86), and were labeled "Receipts and Expenditures of the United States" for such and such a year. The volumes contain separate annual statements, printed by the Public Printer, each entitled "Combined Statement of the Receipts and Disbursements (Apparent and Actual) of the United States for the fiscal year ended June 30," etc.; and each is preceded by a letter to the Secretary of the Treasury from the chief of the Warrant Division, which declares that the statement contains:

"* * * the receipts and disbursements of the Government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, * * * exhibiting the various sources of the revenues, the apparent expense of each branch of the service under the several departments, and of each department on account of 'Salaries,' 'Ordinary' Expenses,' 'Public Works,' 'Miscellaneous,' and 'Unusual and Extraordinary,' and the actual expenses of the same and the *actual* revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not *actual revenues* or *true expenditures*, and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury"—

these statements being officially forwarded by the Secretary to the chairman of the Appropriations Committee of the House of Representatives. [R. 213, 235–236, 257.]

Four other books were offered (Exhibits 87 to 90), each labeled:

"Register of Revenue Covering Warrants
"Miscellaneous
"Secretary of the Treasury
"Warrant Division"—

and these were identified as the original registers for 1872 to 1878, inclusive.

One other volume (Exhibit 91), labeled:

"Receipts of the United States
"1791—
"Register's Office, Treasury Department—

was identified as containing a record of all the Government's miscellaneous receipts from 1791 to date, this being the class of receipts in which dividends on stock owned by the United States would appear. [R. 227–228, 247, 250–251, 252, 258.]

Of these fourteen volumes, Nos. 87–90 are originals, and the other ten are compilations of receipts and expenditures, but all of them are official books kept in the department and purport to contain records of all the money from

conviction that the dividends in question have never been paid. That the money was stolen by the company's trusted servants is its

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every source that had been covered into the Treasury. They contain entries of the fourteen dividends paid by the Canal Company before 1873, but contain no entry of the dividends in dispute.

The defendant offered no evidence, and the court submitted the question whether on the plaintiff's showing the presumption of payment had been rebutted, and whether the company had in fact paid the sums sued for. The verdict was in favor of the Government, and the company assigns for error the admission of certain evidence, and the giving of certain instructions. The evidence complained of is the ten books already referred to, and in order to understand the situation clearly it will be desirable to state more fully the method by which the dividends in question should have reached the Treasury in the usual course of events. [R. 165–170.]

Normally, this would have happened: After a dividend had been declared, a notice thereof would have been sent to the Treasury by the company, stating that the amount due was subject to the Government's order, either by draft, or otherwise. The Secretary would then have drawn at sight upon the company's treasurer, and the draft would have been sent for collection to the Assistant Treasurer of the United States in Philadelphia, the company probably being notified that the draft had been forwarded.

Thereupon the draft would have been presented, and would have been paid either in cash or by check. The Assistant Treasurer would then have issued two certificates of deposit, specifying that he had received this particular payment from the company, and would have transmitted these certificates to the Treasury, at the same time charging himself therewith in his own daily account of receipts. The other party to this account is the Treasurer of the United States, all public moneys being subject to his draft, and for this reason the dividend would have been deposited to the Treasurer's credit, and the Assistant Treasurer would have reported it to Washington as money received by him in account with the Treasurer. After the certificates of deposit and the Assistant Treasurer's daily transcript of account had reached Washington they would have been examined and checked to see that they agreed, and the certificates would then have been made the basis of a deposit list, the list being prepared by the Division of Public Moneys and passed to the division then known as the Division of Warrants, Estimates, and Appropriations—afterwards, the Division of Bookkeeping and Warrants. After this division had received the list containing the items fully set out in the certificates, a warrant would have been prepared formally covering the money into the Treasury, thereby charging the Treasurer of the United States, and fixing his accountability therefor. This covering warrant would have been registered in the Division of Warrants, Estimates, and Appropriations, and would have been passed over to the Division of Public Moneys so that the number and date of the warrant might there be noted.

grievous misfortune, but this is undoubtedly the fact, and the loss must rest where it has fallen. [Italics ours.]

Moreover, the covering warrant (signed by the Secretary of the Treasury) would have been passed to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books in reference to these matters. The Comptroller would have countersigned the warrant, and passed it in turn to the Treasurer of the United States, who would have acknowledged thereon the receipt of the particular money described therein. At the end of the quarter the Treasurer would have submitted to the Auditor of the Treasury an account of the moneys received by him during the quarter, and of his disbursements during the same period. These accounts of the Treasurer are in book form, and are examined and settled by the Auditor, who certifies the balance due by the Treasurer to the United States, charging him with the covering warrants issued by the Secretary of the Treasury, and crediting him with all payments made upon warrants drawn on him by the Secretary. The books of the department show that drafts were drawn for thirteen of the fourteen dividends referred to and were paid to the Assistant Treasurer at Philadelphia, reaching the Treasury in the manner described. No draft was drawn for the fourteenth (the dividend of 1866), but this was deposited directly with the Assistant Treasurer in Philadelphia by the company's treasurer. [R. 165–170.]

The course of accounting just described is commanded by the Federal statutes. Exhibit 91 was compiled from Exhibits 78 to 86, which (as already stated) are combined statements of receipts and disbursements by the Treasurer of the United States, made up in the Division of Bookkeeping and Warrants and sent to the Secretary of the Treasury. The fourteen dividends referred to were all paid in Philadelphia and were entered on the books of the Subtreasury in that city. The ten exhibits now under consideration are not books of original entry in the ordinary sense of that phrase; except in part, they had not been prepared by the witnesses that testified about them; and they were not certified as copies of original documents. It was further testified that all the exhibits had been thoroughly examined, but that no entry had been found therein of any of the dividends in question [i. e., those sued for], although such dividends should have appeared if they had been paid. [R. 245, 247, 250–251.]

This is the evidence that was offered to rebut the presumption of payment—the Government relying on the testimony of the company's guilty employee, on the absence of entries in the Treasury's books, and on the evidence concerning the earlier dividends.

* * * Concerning the present record we shall say nothing more except that *a careful study has satisfied us, not only that the trial judge could not properly have directed a verdict for the company, but also that the evidence carries clear conviction that the dividends in question have never been paid.* That the money was stolen by the company's trusted servants, is its grievous misfortune, *but this is undoubtedly the fact,* and the loss must rest where it has fallen. [Italics ours.]

In such circumstances, it is submitted that the fact of the nonpayment of the dividends is concluded here, especially as there was no evidence whatever (except the presumption operating as evidence) which even tended to contradict the Government's showing. The case is clearly within the rule stated by Mr. Justice Day in *Baker* v. *Schofield*, 243 U. S. 114, where he said (p. 118):

> Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, 169 U. S. 189, 198; *Towson* v. *Moore*, 173 U. S. 17, 24; *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 412; *Dun* v. *Lumberman's Credit Association*, 209 U. S. 20, 23; *Texas & Pacific Ry. Co.* v. *Railroad Commission of Louisiana*, 232 U. S. 338, 339.

To the same effect are: *Compania de Navigation* v. *Brauer*, 168 U. S. 104, 123; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Gilson* v. *United States*, 234 U. S. 380, 383; *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 402; *Villaneuva* v. *Villaneuva*, 239 U. S. 293, 298, and *Causey* v. *United States*, 240 U. S. 399, 401.

But even if there were no such rule, this court, it is submitted, would concur in the finding of the jury and of the judges of the Circuit Court of Appeals. The main links in the chain of evidence on which

the conclusions of the two lower courts are based have already been set forth in discussing the competency of the testimony of the witness Pearson and of the Treasury records to which he referred (*supra*), and need not be repeated.

Some further reference may be made, however, to the testimony of the witness Wilson (R. 116–154). He testified that he entered the employ of the Canal Company in 1855 (R. 116) and left its service in 1886 (R. 117); that his duty, among others, was to collect drafts, deposit funds, fill in the amounts and dates in the company's dividend receipt book, help keep various accounts, etc. (R. 117–119); that he and Leslie, the secretary and treasurer of the company, had embezzled the funds of the company to such an extent that in 1873 there was not sufficient money to pay the dividend of that year on the stock held by the Government; that their misappropriations and the consequent shortage of funds continued, and that the dividends for 1873, 1875, and 1876 remained unpaid; that no notices were sent to the Treasury Department, as had been done before, advising it of the declaration of the dividends (R. 125–126); that instead Wilson and Leslie, aided by a friend, had prepared the false vouchers already referred to, designed to evidence payment of the three dividends, and that he (Wilson) had certain knowledge that none of them had been paid "out of the Chesapeake & Delaware Canal Company's funds before or prior to 1886" because he had knowledge of all the payments that were made at the time (R. 137–138).

When asked on cross-examination whether Leslie may not have paid the amount of the dividends to the Government "out of his own funds which he took" the witness answered (R. 150), "I do not see how he could possibly do it, or where he would get the money to do it with. * * * Some of it I know just exactly where it went * * *."

In 1886 Wilson fled and left behind him a confession and a statement of liabilities of the company; the debts due to the United States were not included, however (R. 144–145). In this connection it should be observed that the Canal Company asserts in its brief, page 24, that the company "made a general settlement * * * with all the people who were known to have been defrauded" and argues, page 28, that for aught Wilson knew "the debt may have been paid at the settlement that was made of his embezzlements in 1886." Aside from the fact, to which Wilson testified positively, that he was sure he had not included in his statement the debts due to the United States (R. 144–145), the circumstance that the company made a general settlement with its creditors, if true, nowhere appears from the present record. The Canal Company offered no evidence, but relied solely upon the naked presumption of payment. The presence in its files of the forged vouchers and receipts, under the circumstances already disclosed, and its presentation thereof to an agent of the Government as late as May, 1914, as evidence of pay-

ment, belies, moreover, the supposition of a "settlement."

The Canal Company, apparently making a virtue of necessity, calls attention "to the fact that there is no conflict of testimony," and states that "the greater part of the record is composed of evidence taken on the part of the plaintiff to establish a fact that was not disputed by the defendant." (Brief, p. 23.) It urges, however, that "*the evidence of Wilson is not evidence to rebut the presumption of payment which arose by reason of the lapse of twenty-six years after the period covered by his testimony.*" (Brief, p. 24.) The answer to this contention is that the direct testimony of Wilson was only a part of the Government's chain of evidence covering the entire period from 1873 to 1914. His testimony can not be considered apart from the fact that the receipts and vouchers which he helped to fabricate remained in the files of the company, mixed with the genuine receipts and vouchers for earlier dividends, or from the further fact that these forged papers were exhibited by the company (in good faith, it may be conceded) to the agents of the Government in 1913 and 1914 as its evidences of payment. The significance of the situation thus disclosed is in no wise impaired, but is heightened, rather, by the circumstance that the Canal Company did not itself choose to rely upon the documents at the trial of the case. Of course it could not do so. As admitted in the company's brief,

the facts were indisputable. The mere presence of the papers in the company's files for upward of thirty-five years told a mute story of nonpayment, and a continuing one; Wilson's testimony merely gave it vocal utterance. Absence of any receipts to evidence payment might have been equivocal; but the presence in the files of the forged receipts and vouchers along with the genuine ones for all the fourteen earlier dividends (Hall, R. 44–46) was unequivocal and conclusive.

The foregoing evidence demonstrates, it is submitted, that the Government proved nonpayment of its claim, not alone by a preponderance of the evidence, which would have sufficed, but to a moral certainty and beyond any reasonable doubt. Indeed, it is difficult in the face of the obvious fact of the nonpayment of these dividends, which pervades this case at every turn, to treat with seriousness the Canal Company's contention that the eyes of the Court should be blinded to the fact and that the presumption of payment should be applied.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

G. CARROLL TODD,
The Assistant to the Attorney General.
LINCOLN R. CLARK,
Attorney, Department of Justice.

JANUARY, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CHESAPEAKE & DELAWARE CANAL COMPANY, plaintiff in error,
v.
THE UNITED STATES OF AMERICA. } No. 192.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN ANSWER TO SUPPLEMENTARY BRIEF FILED BY PLAINTIFF IN ERROR.

The supplementary brief of the Canal Company is primarily a discussion of the question whether the United States is to be regarded, for the purposes of this case, as clothed in its sovereign capacity, or whether it is to be considered as having divested itself of its sovereignty by entering the domain of commerce. (Proposition "A," supplementary brief, p. 1.)

Such a discussion is not, we think, germane to any issue before this court, its only possible relevancy being in the bearing it is alleged to have upon the further question, *which is not an issue here*, whether the Government's suit for unpaid dividends was

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subject to the bar of a State statute of limitations. (Proposition "B," supplementary brief, pp. 1–2.)

As explained in the Government's main brief, pages 1–3, this case has been twice tried before a jury and has been twice before the Circuit Court of Appeals. Prior to the first trial the company's plea of the statute of limitations (of Delaware) was rejected on demurrer (R. 15; 206 Fed. 964), and this action was sustained by the Circuit Court of Appeals when the case was in that court the first time (223 Fed. 926, 927–928). The question of the applicability of the statute to a suit by the United States has not since then been an issue in the case. Specifications designed to renew the question were, indeed, included in the assignment of errors when the case was before the Circuit Court of Appeals for the second time (Nos. 1, 15, 25, 26, 27; R. 345, 353, 357) but they were not pressed, *nor were they even relied upon*, as is evident from their omission from the list of "Assignments of error relied upon by the plaintiff in error" in its brief in the court below (pp. 5, 13, 16); and they were altogether omitted from the assignment of errors in this Court (*loci omis.*, R. 379–380, 388–389, 393–394). These omissions can scarcely have been inadvertent. When, therefore, it is remembered that the present writ is prosecuted to review the *second* judgment of the Circuit Court of Appeals, affirming the *second* judgment of the District Court, the supplementary brief now filed by the canal company can only be regarded as a belated invitation to this Court to go outside the record

before it in order to explore the dead issues involved in the earlier proceedings.

The company, tacitly confessing this situation, asserts, when it comes to the third link in its chain of argument (Proposition "C," supplementary brief, p. 2), that—

> it is not obligatory that the bar of the statute of limitations must be specifically pleaded—the court itself will, of its own initiative, interpose the bar of the statute of limitations where the question is: whether the right to enter suit is not barred by the statute.

The answer to this last contention is twofold—first, that the proposition itself (so far as applied to the facts and circumstances of this case) is manifestly unsound; second, that the question now before this Court is not whether the Government's "right to enter suit" (or, more accurately, to *maintain* suit, once having instituted it) is barred by the statute of limitations, but is on the contrary a different question entirely, namely, *whether the Government, upon the second trial of this case, proved nonpayment of its claim by competent and sufficient evidence.* Upon the proposition that the Court will itself interpose the statute no authorities are cited and no argument is adduced, and the proposition is, so far as we are aware, unsupported by any known principle of law (leaving out of view the limited class of cases where courts of their own motion invoke the statute of limitations for the benefit of wards of the court, or litigants not *sui juris* and not properly represented).

Assuming, however, that the court should disregard the procedural irregularity and consider that the question of the applicability of the statute of limitations is properly before it, there is no merit, it is submitted, in the canal company's contentions. It is well settled that a State statute of limitations will not bar an action brought by the Federal Government. *Chesapeake & Delaware Canal Company* v. *United States*, 206 Fed. 964; 223 Fed. 926, 927–928; *United States* v. *Nashville &c. Ry. Co.* 118 U. S. 120, 125; *United States* v. *Thompson*, 98 U. S. 486, 490; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Des Moines &c. Ry. Co.*, 142 U. S. 510, 538; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554; *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 264–265; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 155–156; *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552, 561; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 313–315.

In *United States* v. *Nashville &c. Ry. Co., supra*, Mr. Justice Gray said (p. 125):

> It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. *Lind-*

sey v. *Miller*, 6 Pet. 666; *United States* v. *Knight*, 14 Pet. 301, 315; *Gibson* v. *Chouteau*, 13 Wall. 92; *United States* v. *Thompson*, 98 U. S. 486; *Fink* v. *O'Neil*, 106 U. S. 272, 281.

The case against the railway company was a suit by the Government upon negotiable coupons of bonds of the railway which the Government had purchased. The action would have been barred by a statute of the State of Tennessee if the suitor had been a private individual. This court held, however, that the statute was inapplicable to the Government. In the present case the suit is for dividends accruing upon stock of the canal company owned by the Government, the subscription for which was originally authorized by Congress during the administration of John Quincy Adams, 4 Stat. 124, 350, cc. 76, 27, in aid of the construction of the company's canal. It can be no impairment of the Government's sovereign status in this case, as the canal company's supplementary brief seems to suggest, that the stock was acquired pursuant to the express authorization of Congress.

The case of *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, on which the company relies, supports no such position. The case merely holds that the United States or a State on becoming a stockholder in a bank or other corporation *does not thereby impart sovereignty to such institution*. Thus the United States in becoming a stockholder of the canal company did not confer sovereignty upon the company. It does not in the least follow (but quite the reverse)

that the United States has laid aside its own sovereign capacity to sue the company regardless of any local State statute of limitations.

In concluding, it is proper to state that Propositions "D" and "E", referred to in the supplementary brief, page 2, as questions considered in the main argument, are not the real issues presented by this record. There is no dispute, for example, that the burden of proof was upon the Government to establish nonpayment. The only real issue is whether the Government did in fact establish nonpayment (*a*) by competent evidence, and (*b*) by sufficient evidence. (Government's main brief, pp. 18 *et seq.*, 45 *et seq.*)

Respectfully submitted:

ALEX. C. KING,
Solicitor General.

G. CARROLL TODD,
Of Counsel.

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